## APPENDIX A

# COURT OF APPEALS OF KENTUCKY

**RENDERED: MAY 31, 1974**

**No. 74-73**

LEROY HOOD - - - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

*Appeal from Nelson Circuit Court*
*Honorable Charles R. Richardson, Judge*
No. 3979

## MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING

**(Not to be cited as authority)**

On this appeal from a conviction of stealing a pick-up truck, we do not find merit in the appellant's complaint of a violation of his right against unreasonable search. Appellant's only possessory claim to the truck was that of a thief, and the only intrusion into the truck by the officer was to read the serial numbers by which to determine ownership, after the truck had been taken into protective custody following the appellant's arrest for disorderly conduct, and after the officer who read the serial numbers had been told by another officer that he had "information that the truck was stolen."

Likewise we find no merit in appellant's claim of error in the admission of testimony that he had been indicated for knowingly receiving parts stolen from another truck. The owner of the other truck testified, without objection, that parts from her truck, which had been stolen and stripped, were found on the truck that the appellant was on trial for having stolen. On cross-examination she was asked whether "any charges were ever brought against anyone for stealing" her truck, to which she answered, "No, sir." On redirect examination she was asked, over objection, whether an indictment had been brought for the stolen *parts*, and she replied that the appellant had been indicted for "knowingly receiving stolen property of the tires and things."

Aside from the fact that the appellant opened up the question of criminal charges having been brought with respect to the other truck, it is plain that any prejudice the appellant may have suffered from the testimony that he had been indicted for receiving the stolen parts was insignificant in the light of the testimony, to which he did not object, that the stolen parts were on the truck he was on trial for stealing, and that the parts were stolen several weeks after the appellant claimed to have purchased the truck with the parts on it.

The judgment is affirmed.

All concur.

**Attorney for Appellant:**
JOSEPH A. BIAGI
Shelbyville, Kentucky 40065

**Attorney for Appellee:**
HONORABLE ED W. HANCOCK
Attorney General
G. EDWARD JAMES
Assistant Attorney General
Frankfort, Kentucky 40601

## APPENDIX B

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## APPELLANT'S PETITION FOR REHEARING DENIED—9-13-74

### MANDATE

THE COMMONWEALTH OF KENTUCKY, THE COURT OF APPEALS | 74 Term—May 31, 1974

LEROY HOOD

*v.*

COMMONWEALTH OF KENTUCKY

*Appeal from a judgment of the Nelson Circuit Court # 3979, File # 74-73*

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

(s) Frances Jones Mills, C. C. A.

A copy—Attest:
Issued Setpember 13, 1974

## APPENDIX C

# NELSON CIRCUIT COURT

**No. 3979**

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

*v.*

LEROY HOOD - - - - - - - - *Defendant*

## MOTION TO SUPPRESS EVIDENCE

Defendant, Leroy Hood, moves the Court to suppress and exclude any and all evidence obtained as a result of the illegal entry and search of the defendant's vehicle and the illegal arrest of the defendant on or about December 23, 1973, on the following grounds:

1. That the search was unreasonable, in violation of Section 10 of the Kentucky Constitution and the 4th and 14th Amendments of the United States Constitution.

2. The search and seizure of defendant's vehicle and its contents was without a warrant or the consent of the defendant.

3. No probable cause existed for the defendant's arrest.

4. No probable cause existed for the search and seizure of the defendant's vehicle.

5. The defendant's arrest was incidental to and a mere pretext for the search.

WHEREFORE, defendant prays that said evidence be suppressed and held by the Court inadmissible in this cause

against this defendant. Defendant further requests a hearing before trial and out of the presence of the jury.

Joseph A. Biagi
Richard Barlow
Attorneys for Defendant

## APPENDIX D

### MOTION FOR NEW TRIAL

Defendant, Leroy Hood, by counsel, moves the Court to set aside the verdict returned in the above-entitled action on June 15, 1973, and the judgment entered thereon on June 15, 1973, and to grant a new trial on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The court erred in overruling defendant's Motion to Suppress Evidence following the pre-trial hearing on said motion wherein the evidence clearly established that the search and seizure was conducted without a search warrant and was not incident to the defendant's arrest, but was in fact conducted separate and independent of said arrest, and that the testimony of Trooper Collins established that a "secret" serial number was "lifted" from the truck at a point and time several days removed from the defendant's arrest. Further, the testimony of Officer Goatley established that a search warrant could not have been applied for and legally issued prior to this independent search.

4. The court erred in allowing Mrs. Ruth Hayes to testify, over defendant's objection, that the defendant had been indicted on the charge of "Knowingly Receiving

Stolen Property," which property she testified consisted of the seats, tires and sun visor of a truck that was stolen from her and later found stripped, which truck was not the vehicle for which the defendant was charged in this action, which objectionable testimony was so highly prejudicial that the defendant did not receive a fair and impartial trial.

This motion is based upon the records and proceedings in this action.

Respectfully submitted,

Joseph A. Biagi
Richard Barlow

By_____

Attorneys for Defendant

## APPENDIX E

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**[PORTIONS OF BRIEF FOR APPELLANT]**

# COURT OF APPEALS OF KENTUCKY

**File No. 74-73**

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LEROY HOOD - - - - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

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*May it please the Court:*

## STATEMENT OF THE CASE

### I. The Nature of the Proceedings

This is an appeal from a criminal conviction in the Nelson Circuit Court, Honorable Charles R. Richardson, presiding.

On February 26, 1973, the Grand Jury of Nelson County returned an indictment (No. 3979), charging the defendant Leroy Hood, with the offense of taking and operating an automobile owned by Sam Tracy without his knowledge and consent in violation of KRS 433.220. Hood was tried by Petit Jury on June 14 and June 15, 1973, and found guilty as charged and sentenced to four years in the Kentucky State Penitentiary. The defendant made a pre-trial motion to suppress evidence (TR 12) on the ground that the warrantless search of his vehicle was unreasonable, in violation of the Kentucky and United States Constitutions. Hood is free on bond pending this appeal.

* * * * * * *

## ARGUMENT

Defendant stated as ground in his motion to suppress that the search was unreasonable, in violation of Section 10, the Kentucky Constitution, and Amendments 4 and 14 of the United States Constitution. This issue was also raised by motion for new trial timely filed. The violation of defendant's constitutional right against unreasonable search and seizure, both under the state and federal constitutions, was thus specifically raised.

### I.

### The Trial Court Erred in Denying Defendant's Motion to Suppress Evidence and His Motion for a New Trial on the Ground That the Search and Seizure of the Vehicle Was Unlawful.

A search without a warrant is deemed to be per se unreasonable, subject to several well delineated exceptions. The Fourth Amendment to the Constitution of the United States and Section 10 of the Kentucky Constitution affords protection against warrantless searches and seizures.

An important exception to the constitutional prohibition against unreasonable searches and seizures is the right of an arresting officer to search and seize without a warrant incident to a legal arrest. This exception can be narrowed for the purpose of this discussion to the validity of the search and seizure of a motor vehicle following the arrest of the driver for a minor violation.

This Court has held that an arresting officer has the right to search the person of a prisoner lawfully arrested and take from his person any property connected with the offense for which he is arrested, or any weapon or thing that might enable the prisoner to escape or do some act of violence. As stated by this Court in *Lane* v. *Commonwealth*, Ky., 386 S. W. 2d 743 (9165) at page 745:

> "Hard reality demands that the person in custody be disarmed in order to protect the officer from harm, to prevent the escape of the arrestee, or the destruction of evidence which pertains to the offense for which he was detained."
>
> * * *
>
> "It is our opinion that when a person is arrested for a traffic or other minor violation, the mere fact of the arrest does not give to the officer absolute right to search the vehicle or the premises indiscriminately."

The above decision of the Kentucky Court is subject of an annotation in 10 ALR 3d 314. The following comment is found on page 325:

> "On appeal, the reviewing Court reversed, the Court stating that when a person is arrested for a traffic or other minor violation, the mere fact of arrest does not give to the officer the absolute right to search the vehicle or the premises indiscriminately. The Court said that while its opinion in this case should not be construed to mean that a person in custody may not be searched in order to be disarmed, or to prevent escape or the immediate destruction of evidence for which he was detained, in the case at bar there were no facts of an extreme emergency, the Court noting that the defendant had been arrested, searched, and placed in another car, and adding that if the arresting officer was interested in a search of the defendant's automobile, he might have obtained, upon proper ground, a search warrant. The Court then said that it agreed with the principle that an arrest may not be used as a pretext to search for evidence, and concluded that the lower Court erred in overruling defendant's motion to suppress the evidence in question."

In *Ison v. Commonwealth*, Ky., 471 S. W. 2d 712 (1971), the trooper stopped Ison for failing to dim his lights at

night, after noting that the car had Harlan County license plate and was heavily loaded with something. Ison could not furnish a registration certificate for the vehicle and furnished a fictitious name as owner of the car. After placing Ison in his cruiser, the trooper without a warrant or permission, opened the trunk and discovered ten cases of whiskey. Ison was convicted for transporting in dry territory.

In the opinion, this Court reaffirmed that warrantless searches are per se unreasonable subject only to a few specifically established and well-delineated exceptions "which are jealously and carefully drawn." The Court, citing *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), stated:

> "The Coolidge case reaffirms the basic holding in Carroll v. United States * * * that was approved in Chambers v. Maroney * * *. The Carroll decision was that contraband goods concealed and illegally transported in an automobile may be searched for without a warrant provided that 'the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

It is felt that the Court thus expanded the exception in the *Ison* case to include circumstances where the arresting officer has probable cause to believe that some other crime than the minor offense for which he has stopped the driver has been committed.

The Court concluded its opinion as follows:

> "The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. (Per Justice Stewart in Coolidge . . .). We are unable to justify the warrantless search as incident to an arrest, nor on evidence observed in

'plain sight', nor on probable cause to believe that the transportation of contraband was in the course of being effect upon facts observed after a proper stopping of the vehicle. The warrantless search was constitutionally impermissible under the facts presented by the record. The evidence of the fruits of that search was inadmissible and should have been suppressed."

In addition to the above prerequisites to a valid search without warrant incident to an arrest, it is held generally that the search must be contemporaneous with the arrest; otherwise it would be invalid. If the search is too remote in time or place, the search would be unlawful. See Am. Jur., Searches and Seizurers 1st ed. Sec. 19; 10 ALR 3d page 328.

As pointed out in the ALR annotation, the leading case in support of this rule is *Preston* v. *United States*, 376 U. S. 364, 11 L. ed. 2d 777, 84 S. Ct. 881 (1964), which involved arrest on a vagrancy charge, where defendants were convicted of conspiring to rob a bank, largely on evidence obtained by the officer's search of the car after defendants had been arrested, searched, and taken to headquarters, and the car had been removed to a garage.

In the *Preston* case the Supreme Court held that the evidence so obtained was inadmissible because the search of the car was without a warrant, was too remote in time or place to have been made as incidental to the arrest, and was therefore violative of the test of reasonableness under the Fourth Amendment. The usual justifications for a warrantless search are absent where the search is remote in time or place from the arrest, and once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. Nor, continued the Court, since the men were under arrest at the police station and the car was in the police custody at the garage, was there any danger that the car would be moved out of the locality or jurisdiction.

In the same annotation (10 ALR 3d at page 329), this Court's decision in *Flannery* v. *Commonwealth*, Ky., 324 S. W. 2d 128 (1959), is discussed as follows:

> "In Flannery defendant was arrested for operating a motor vehicle with defective lights, and his companion . . . for public drunkenness, and after they were jailed, their truck was forced open and searched by the arresting officer, and several cases of beer and liquor were discovered, which formed the basis of (their conviction for transporting). On appeal, the Court upheld defendant's argument that the search was invalid, for it was made sometime after the arrest and after both defendant and the truck had been taken to the county jail. The Court reasoned that the search was not made incident to the arrest nor in defendant's immediate presence, and the Court held as prejudicial error the admission of evidence obtained as a result of the search."

Relating the facts and circumstances of the present case of defendant Hood to the applicable law, it is observed that the search and seizure of the vehicle occupied by Hood was without a warrant or the consent of defendant. No contention was made at any time by the Commonwealth that the search was made by warrant or consent of the accused. Therefore, the burden of reasonableness of the search must shift to the Commonwealth to establish that it was within the established exceptions.

At the time of Hood's arrest for disorderly conduct, the arresting trooper had no reasonable basis or probable cause to believe that Hood was in possession of a stolen vehicle (TE 35). The testimony of Officer Goatley that he passed on information to the trooper "as to a truck that had been stolen from Mr. Sam Tracey of Franklin County" (TE 35) and that he recognized the truck as being the "same one

that I had been investigating" (TE 36) must be relegated to the realm of sheer suspicion, based on the officer's own testimony:

> "8. Now, sir, tell us why you didn't pick up the defendant in this truck at the times you said you had seen him operating it prior to the date you were called by Collins to assist in the arrest of the defendant?
>
> A. Yes. I felt that my information was not substantial enough to obtain a search warrant or attempt to investigate the incident. Further, at that time I wasn't sure" (TE 43).

Furthermore, the inference must be drawn that the officers had insufficient probable cause at the time of Hood's arrest on December 23 to charge him with operating a stolen vehicle, for it was not until December 26 after the hidden secret serial number had been lifted from the frame several days after his arrest, that they had information sufficient to swear out a warrant that there were reasonable grounds for believing that Hood had committed the offense (TR 4).

As stated in the *Ison* case, "it is extremely doubtful, at best, whether a search warrant could have legally issued, had it been applied for," based on the circumstances after Hood's arrest and before the general exploratory search of the truck after it had been removed to the garage.

Furthermore, after the arrest of Hood and his restraint in jail, there was more than ample opportunity to obtain a search warrant had reasonable grounds existed.

The evidence clearly established that there was no justification for the search incident to the arrest, nor on evidence observed in plain sight. To the contrary, the incriminating evidence was obtained in the course of an independent and unrelated search made several days later inside the garage, at which time the trooper lifted the hidden, secret serial number.

In addition, the holdings of the Supreme Court in the *Preston* case and of this Court in the *Flannery* case apply. The search was invalid because it was too remote in time or place to have been incidental to the arrest, and was therefore violative of the test of reasonableness.

In conclusion, it is submitted that the following statement of this Court found in the *Lane* decision, is apropos to this case:

> "The case at bar did not offer facts of an extreme emergency. Appellant had been arrested, searched and placed in another car. If the arresting officer was interested in a search of the automobile, he might have obtained, upon proper ground, a search warrant" (page 745).

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## APPENDIX F

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## [PORTIONS OF APPELLANT'S PETITION FOR REHEARING]

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The appellant respectfully requests the Court to rehear his appeal and files this Petition for Rehearing to bring to the Court's attention what appears to be the inconsistency regarding the appellant's Fourth Amendment rights between the Court's Memorandum Opinion herein, rendered May 31, 1974, and the application of the law as determined by the United States Supreme Court.

The Memorandum Opinion, holding that there was no merit in appellant's complaint of a violation of his right against unreasonable search, is founded on the reasoning:

(1) That appellant's only possessory claim to the truck was that of a thief, that is to say in effect, that appellant had no standing to complain, and,

(2) The only intrusion into the truck by the officer was to read the serial numbers by which to determine ownership, in effect, holding that there was no "search."

In regard to the issue of the appellant's standing, we point out that the Commonwealth did not attempt to justify the "search" on this ground and, therefore, the contention of appellant's lack of standing was not raised on appeal or at the trial had below.

The appellant was indicted for taking and operating a motor vehicle without the owner's consent. At the time of his arrest for disorderly conduct he was in possession of the truck and one of the arresting officers was aware that he had openly operated the vehicle for several months before. The same day of the arrest, the officers had the truck towed to a private garage and made the usual routine "inspection," that is, they took down the serial number found on the door post, checked it out and determined from this investigation that appellant's possession had the indicia of legitimacy.

Of controlling importance, we believe, are the facts that the appellant had been detained in jail and the truck "immobilized" by impoundment under police authority.

It is contended that at this point in time, if the appellant has standing, the further acts of the officer two or three days later, in going back to the garage and searching for, and lifting, the secret serial number, constituted an unreasonable intrusion of appellant's privacy. Not only was this remote in time, but no exigency existed as the vehicle was impounded and appellant was confined in jail some miles distant. If the other officer had reliable information (which he testified he did *not* have), there was clearly ample opportunity to obtain a search warrant.

In analogous cases, where the element of possession of the seized evidence constitutes the crime charged, the Supreme Court has held that the defendant charged has standing even though he denies ownership of the item seized.

In *Jones* v. *United States*, 362 U. S. 257, 263, 80 S. Ct. 725, 732 (1960), the Court stated that "to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises, prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." The Court stated "Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

In the instant case, the taking, driving and operating of the truck without the owner's consent constitutes the crime charged; thus, possession of the vehicle is an essential element. It follows that the Supreme Court's holding that where a possessory crime is charged, the indictment suffices to confer standing, is applicable. (See United States v. West, 453 F. 2d 1351, 3d Cir. 1972).

Therefore, it is contended that the appellant has standing under the Supreme Court's ruling to seek redress of his Fourth Amendment rights of the United States Constitution.

Further, it is contended that it is in conflict with the Supreme Court's decisions to hold that inspection of a

vehicle's identification number is not a search subject to the proscriptions of the Fourth Amendment.

In U. S. v. Powers, 439 F. 2d 373 (1971, USCA, 4th Cir.), it was held that such an inspection is a search subject to the proscriptions of the Fourth Amendment. There the Court stated:

> "*Davis* v. *Mississippi*, 394 U. S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) and *Terry* v. *Ohio*, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), compel the conclusion, we believe, that inspection of a car's identification number is a search subject to the proscriptions of the Fourth Amendment. * * *: Police actions in each case, the Court held, involved governmental invasion of a person's privacy and, therefore, its fruits were subject to the exclusionary rule that the Court has fashioned to enforce the Fourth Amendment. Similarly, inspection of a vehicle's identification number, which necessarily requires examining parts of the car not in plain view, may intrude on the occupant's privacy by unlawfully detaining them. If the evidence that the inspection produces is to be used against them, it must be obtained, just as in *Davis* and *Terry*, by conduct sanctioned by the Constitution."

To require less, the Court stated in the above opinion, or the refusal to treat the inspection as a search, could thwart rights secured by the Fourth Amendment by subjecting the owners of vehicles to unrestrained governmental intrusion.

We are constrained to quote from a dissenting opinion in *U. S.* v. *Johnson*, 431 F. 2d 441 (1970) (USCA, 5th Cir.), where the majority opinion held that such inspections did not constitute a search, or if it were a search, it was not unreasonable. In the dissent, Judge Godbolt said:

> "In our increasingly complex world our motor vehicles are not the only things numbered for identification,

So are such tangible effects as household appliances, lawn mowers, outboard motors, and even the watches on our wrists. Add to the list such papers and documents kept in the home, safe deposit box or on the person, as bank checks, driver's licenses, social security cards, insurance policies, securities and deeds and mortgages, and the automobile registration papers often carried in the glove compartment of the car. All of these items have primary or secondary qualities of identification, but this does not subject them, when not in plain view, to being sought out by police action beyond the reach of the Fourth Amendment."

In conclusion, for reasons stated herein, we respectfully petition for rehearing of appellant's appeal.

(s) Joseph A. Biagi
Attorney for Appellant